DEVELOPMENT & COMMERCIAL BANK BHD.

v.

MOHD. SAMSUDIN SHAFIE & ORS.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 488 OF 1983]
3 APRIL 1989

CIVIL PROCEDURE: *Application to withdraw action and judgment against defendants - Suit filed in 1983 - Notice of demand not served on guarantors - Change of solicitors - Whether the application was detrimental to the defendants.*

The plaintiff filed a suit on 14 June 1983 against the defendants. Subsequently, the plaintiff obtained judgment against the defendants before the Senior Assistant Registrar, the defendants appealed. On 5 August 1988, the appeals were allowed and the matter was subsequently fixed for trial on 11 October 1988. However, one day before the hearing date, the plaintiff applied to withdraw the action against the defendants with liberty to file afresh on the ground that the notice of demand was not served on the guarantors.

Held:
It was too late in the day for the plaintiff to apply to withdraw the suit with liberty to file afresh. Any further delay would be unfair and as such the application would be detrimental to the defendants taking into account all the circumstances of the case.

[Application dismissal with costs. Alternatively, plaintiff given leave to withdraw the suit against the defendants without liberty to file afresh with each party bearing their own costs.]

Legislation referred to:
Rules of the High Court 1980, O. 14

For the plaintiff - Selvanathan; M/s. Kean Chye & Sivalingam
For the 2nd, 3rd, 4th & 5th defendant - B.C. Chan; M/s. A.K. Lee & Co.
For the 1st defendant - Ho Kam Phaw; M/s. Annuar & Ho

JUDGMENT

Abdul Malek Ahmad J:

By encl. 66, the 1st defendant had filed a notice of appeal against the decision of the learned Senior Assistant Registrar given on the 30 October 1978 granting summary judgment in favour of the plaintiff. By encl. 69, the same defendant had applied that execution on the said judgment be stayed until the final determination of the appeal. By encl. 71, the 2nd, 3rd, 4th and 5th defendants had also appealed against the same order for summary judgment which had been granted against them in favour of the plaintiff on the same date.

Enclosure 69 was subsequently withdrawn by the Counsel for the 1st defendant and it was accordingly struck out with no order as to costs. As regards the two appeals, the Court had on 5 August 1988 allowed them with costs after hearing arguments, holding that triable issues had been raised and that the matter should go for trial. The learned Senior Assistant Registrar was ordered to give an early hearing date and the matter was accordingly fixed for 11 October 1988 for hearing.

However, one day before the hearing date, learned Counsel for the plaintiff applied to have encl. 77 heard first and the matter was then adjourned to 13 February 1989. Enclosure 77 was essentially an application by the plaintiff for an order that they be at liberty to withdraw the action against the 1st, 2nd, 3rd, 4th and 5th defendants, to vacate the judgment against the 6th defendant dated 12 April 1985 to file afresh against all the defendants and for costs to be taxed.

In their supporting affidavit, the manager of the plaintiff averred that at the O. 14 hearing before the learned Senior Assistant Registrar against the 1st, 2nd, 3rd, 4th and 5th defendants, the said defendants had alleged that the plaintiff did not serve a notice of demand on the guarantors before the filing of the writ. In the event, the plaintiff had been advised by their solicitors that the plaintiff would incur extra costs in the event the Court held that the demand was a prerequisite to the writ being filed. They added that by filing the claim afresh, matters would be regularised particularly in view of the fact that the proceedings at the time of their commencement were conducted by another firm of solicitors who had since been discharged by the plaintiff.

In his submission, learned Counsel for the plaintiff admitted that the notice of demand was not served before the writ of summons was served on the defendants and he in fact did not have the relevant documents as the matter had been handled by different solicitors earlier. The application, he added, was to preempt the possibility of the defendants stating at the trial that they had not been served with the demand. Learned Counsel for the 2nd, 3rd 4th and 5th defendants, who was also mentioning on behalf of Counsel for the 1st defendant, argued that the demand was a prerequisite and at the O. 14 hearing before the learned Senior Assistant Registrar, a notice of demand dated 1986 had been tendered whereas the writ had been filed in 1983. Counsel further argued that when the appeals against the summary judgment were allowed, the Court had ordered an early hearing date and the present application was therefore prejudicial to the defendants.

Having considered the arguments, I was of the opinion that as this case had been filed way back on 14 June 1983 and that judgment in default had been entered against the 6th defendant on 12 April 1985 and summary judgment had been ordered by the learned Senior Assistant Registrar against the 1st, 2nd, 3rd, 4th and 5th defendants on 30 October 1987, which had been set aside on appeal on 5 August 1988 on the grounds that triable issues had been raised, that despite the change of solicitors for the plaintiff, it was too late in the day for the plaintiff to make this application now since the further delay would be unfair, and the application would be detrimental, to the defendants taking into account all the circumstances of the case. I accordingly dismissed the application with costs. Alternatively, I gave the plaintiff the liberty to withdraw against the first five defendants and to vacate the judgment in default against the 6th defendant without the Court granting them leave to file the action afresh in which case each party was to bear their own costs.

Also found at [1990] 1 CLJ 267